

Federal Communications Commission

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Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-171
Table of Allotments,)	RM-8846
FM Broadcast Stations.)	RM-9145
(Indian Springs, Nevada, Mountain Pass,)	
California, Kingman, Arizona, and St.)	
George, Utah))	

REPORT AND ORDER
(Proceeding Terminated)**Adopted: April 4, 1998****Released: April 17, 1998**

By the Chief, Allocations Branch:

1. At the request of Claire B. Benezra ("petitioner"), the Commission has before it the Notice of Proposed Rule Making and Orders to Show Cause, 11 FCC Rcd 9336 (1996), proposing the substitution of Channel 257C for Channel 257A at Indian Springs, Nevada, and the modification of Station KPXC's construction permit to specify operation on the higher class channel.¹ To accommodate the allotment of Channel 257C at Indian Springs, the Notice also proposed the substitution of Channel 259B for Channel 258B at Mountain Pass, California, the substitution of Channel 261C2 for Channel 260C2 at Kingman, Arizona, and the substitution of Channel 260C for Channel 259C at St. George, Utah. Comments were filed by the petitioner, as well as by New West Broadcasting Systems, Inc. ("New West"), licensee of Station KGMN, Kingman, Arizona, Brawley Broadcasting Company ("Brawley"), licensee of Station KMXX, Imperial, California,² and KHWY, Inc. ("KHWY"), licensee of Station KHYZ, Mountain Pass,

¹ The Order to Show Cause was directed to the licensees of Station KHYZ, Mountain Pass, California, and KGMN, Kingman, Arizona. An Order to Show Cause to the licensee of KZEZ, St. George, Utah, was unnecessary because it submitted a letter as part of the petition for rule making agreeing to the change in channel.

² Brawley's comments also included what it terms a "counterproposal" to substitute Channel 257B1 for Channel 257A at Imperial, California, and substitute Channel 258C2 for Channel 257C2 at Parker, Arizona. It acknowledges that this pleading may not be acceptable for consideration as a counterproposal herein since the Imperial and Parker channel allotments are not in conflict with, but rather contingent upon, the grant of the proposals under consideration herein. Brawley is correct that absent a conflict with any of the channel changes proposed in the Notice herein, its pleading is not acceptable as a counterproposal. See, Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931, n. 5 (1990). We have, however, considered its pleading as comments in support of petitioner's proposal.

California.³ KHWY's comments included a counterproposal proposing the substitution of Channel 272C for Channel 257C at Indian Springs.⁴ Reply comments were filed by the petitioner, KHWY, Indian Springs Broadcasting Company ("ISBC") and Calvin J. and Lois A. Mandel ("Madel").

2. In comments, petitioner reiterates her intention to apply for Channel 257C, if allotted to Indian Springs. She also reiterates her intention to reimburse Stations KHYZ, KGMN and KZEZ-FM (formerly KGSI) for the reasonable costs associated with changing their operating frequencies.

3. Brawley also supports the adoption of petitioner's proposal, stating that if Mountain Pass Station KHYZ moves to Channel 259, its Station KMXX at Imperial, California, could upgrade from its present Channel 257A to Channel 257B1. It recognizes that the allotment of Channel 257B1 at Imperial is contingent upon, rather than in conflict with, the grant of petitioner's proposal, and, as such, may not be acceptable for consideration as a counterproposal herein, citing Milton, West Virginia and Flemingsburg, Kentucky, 11 FCC Rcd 6374 (1996). However, it states that in an abundance of caution, it is submitting the proposal to substitute Channel 257B1 for Channel 257A at Imperial. To accommodate the allotment at Imperial, Brawley also proposes the substitution of Channel 258C2 for Channel 257C2 at Parker, Arizona, and the modification of Station KVEZ's license accordingly. Brawley states that Channel 258C2 can be allotted to Parker at Station KVEZ's licensed site and Channel 257B1 can be allotted to Imperial at the site specified in Station KMXX's outstanding construction permit (BPH-960408IB). It also commits to reimbursing Station KVEZ for the costs associated with its change of channel.

4. KHWY agrees with the allotment of a Class C channel to Indian Springs since it could provide service to a substantial "white area" but opposes the modification of Station KHYZ's license to Channel 259B. It argues that the proposal advanced by the petitioner is not the most efficient method of accomplishing this goal. KHWY contends that allotting Channel 272C, instead of Channel 257C, to Indian Springs would result in greater "white area" coverage while not requiring any station to change its channel. It states that the allotment of Channel 272C, at coordinates close to those proposed by the petitioner, would result in the provision of a first fulltime aural service to an area 70 percent larger and with twice as many residents.⁵ Specifically, it states that on Channel 272C, Station KPXC would provide a first service to a

³ Comments were filed by KHWY (California), L.P. However, on October 18, 1996, pursuant to Commission approval, KHWY (California), L.P. assigned the license for Station KHYZ to KHWY, Inc., the general partner of KHWY (California), L.P. Thus, KHWY, Inc. is now the licensee of Station KHYZ and, as such, filed its reply comments under the name of KHWY, Inc.

⁴ Public Notice of the filing of the counterproposal was given on July 28, 1997, Report No. 2213, Mimeo 75517.

⁵ The coordinates proposed by KHWY in its counterproposal are 36-31-00 NL; 115-59-35 WL, which represents a site 20 kilometers (12.1 miles) northwest of the site proposed by the petitioner.

"white area" encompassing 14,832 square kilometers, with a population of 3,193 persons, as compared to a "white area" service on Channel 257C covering 8,647 square kilometers with a population of 1,549 persons. Because KHWY proposes a non-adjacent channel upgrade for Station KPXC, it points out that Channel 276C is available for allotment should an interest be expressed in Channel 272C at Indian Springs.

5. KHWY states that the Commission has recognized that channel substitutions impose a burden on licensees and cause inconvenience for listeners and thus permits such substitutions only upon a finding that these disruptions are justified by public interest benefits, citing Blair, Nebraska, 8 FCC Rcd 4086, 4087 n.8 (1993). KHWY contends that it would be contrary to the public interest to change Station KHYZ's frequency because, along with its sister station, KRXV(FM), at Yermo, California, the station provides a "unique" safety service for travelers across the Mojave desert. KHWY is concerned that Station KPXC, operating as a high powered Class C station only two channels removed from its Mountain Pass station would result in interference to its signal. It submits that the Commission agreed with KHWY's recognition of the unmet need of millions of yearly travelers along Interstate 15 for 24-hour access to road, weather and emergency information when it approved the allotments, citing Yermo and Mountain Pass, California, 45 RR 2d 58 (1979). It contends that the "critical" role which these stations play is further evidenced by the signs which the Nevada Highway Department has placed along Interstate 15 instructing motorists to tune to their stations for emergency, highway and weather information and the waiver which the Commission granted in 1985 allowing Station KHYZ to increase its effective radiated power from 2.29 kilowatts to 10 kilowatts, in excess of the normal Class B maximum.⁶ KHWY asserts that changing Station KHYZ's frequency would cause the millions of travelers to experience confusion and undermine the safety services which they have come to rely on. No such confusion would occur if Station KPXC at Indian Springs is modified to operate on Channel 272 instead of 257 because the station is not constructed and thus is not on the air. Therefore, it urges the adoption of its proposal which will enable Station KPXC to achieve Class C status while also not imposing an unnecessary burden on three other stations.

6. New West also opposes the modification of its license for Station KGMN at Kingman. It supports the counterproposal submitted by KHWY and incorporates by reference the technical showing accompanying the counterproposal.

7. KHWY, in reply comments, reiterates that its proposal to substitute Channel 272C for Channel 257A at Indian Springs would better serve the public interest than petitioner's proposal because it can provide service to a larger and more populous "white area" without requiring three other stations to change channel. It also opposes the acceptance of Brawley's proposal to upgrade Station KMXX at Imperial and substitute channels at Parker, Arizona. Rather than being a counterproposal, KHWY states that it is contingent upon the grant of petitioner's proposal and thus cannot be considered in this proceeding, citing Milton, West

⁶ See BPH-820714AB, granted May 22, 1985.

Virginia and Flemingsburg, Kentucky, supra, Wilmington, North Carolina, 6 FCC Rcd 6969, 6971 (1991), and Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, supra. Further, it states that Brawley's proposal is fatally flawed even if the Commission were to accept Brawley's proposal in this proceeding. KHWY points out that Commission policy requires all parties in a proceeding which benefit from another station changing channel to share in the reimbursement of the costs associated with such a channel change. To this end, Brawley, as a beneficiary of the change in channel by KHYZ, has failed to state its intention to reimburse KHWY for the cost of changing channel even though it did state such an intention with respect to Station KVEZ at Parker. In addition, KHWY notes that the allotment of Channel 257B1 at Imperial would be short-spaced to two Mexican stations in violation of Section 73.207(b)(3) of the Commission's Rules. Although it recognizes that restricted allotments are permitted under the U.S.-Mexican Agreement, Brawley has not shown whether it can provide the interference protection to the two Mexican stations. Finally, it states that Brawley's proposed upgrade at Imperial can be accomplished without requiring Station KHYZ to change channel since there are four channels which can be assigned to Station KVEZ at Parker that would accommodate the Imperial proposal without requiring any other changes.

8. Petitioner, in reply comments, disputes the harm which KHWY states will be caused if its Station KHYZ changes its operating channel from 258B to 259B. First, petitioner states that her proposal complies with Commission policy set forth in Columbus, Nebraska, 59 RR 2d 1184 (1986), regarding rule makings which require three or more stations to change channel since only two stations will be required to involuntarily change channels. The licensee of Station KZEZ at St. George, Utah, has agreed to the modification of the station's license to specify Channel 260C. Next, she contends that there should be little disruption to Station KHYZ's listeners if they have to tune in a different frequency since KHWY states that the primary aim of the station is to serve the highway travelers who pass through the area rather than local residents who may have set their radio push buttons to the station's present frequency. Thus, she sees no difficulty in a listener tuning to the station on 99.5 MHz instead of its present 99.3 MHz. Further, petitioner has stated her willingness to reimburse Station KHYZ for the reasonable costs associated with its change of channel and she states that this would include the costs of altering billboards and other signs to inform the public of the station's new frequency. As to KHWY's concern over interference from Station KPXC if modified to a frequency only two channels away, she points out that the allotment can be made in compliance with the Commission's minimum distance separation requirements and that the only interference protection which stations are entitled to are those arising from the mileage separation requirements.

9. Petitioner points out that KHWY's counterproposal was not advanced to provide for a new station or an upgrade of an existing station. Rather, she argues that the only reason the proposal was advanced was to avoid having to change, by even one channel, its presently authorized frequency. However, in proposing the allotment of Channel 272C to Indian Springs, KHWY has had to utilize a proposed transmitter site different from the one proposed in the petition for rule making. She argues that while KHWY has selected a theoretically acceptable site, no demonstration was made that the proposed reference site is available and suitable other

than to show that the site complies with the Commission's minimum distance separation and city-grade service requirements. Because the site identified by KHWY is at the minimum permitted distance from Station KFMS-FM at Las Vegas, Nevada, petitioner submits that she will be severely limited in moving the proposed transmitter site in a southeasterly direction. She does not dispute that the transmitter site proposed by KHWY would serve a greater white area but contends that such a factor is only relevant when the Commission is comparing competing proposals put forth by competing petitioners. If KHWY were proposing a new allotment to a different community, she states that the proper comparison would be between the site proposed by the existing licensee for its upgrade and the theoretical site for the new allotment. However, she argues that this is not the case here. Rather, KHWY does not propose to operate a station from the proposed site and provides no description of the site other than providing the coordinates. In this respect, while it appears from KHWY's showing that a large area exists where a Channel 272C transmitter could be sited and provide city-grade coverage, it does not take into account a number of areas that are excluded as possible sites, including the Nevada Test Site, Nellis Air Force Range, the Ash Meadows National Wildlife Refuge and the Desert National Wildlife Range. The need for an unobstructed line-of-sight from the transmitter site to Indian Springs also limits the choice of transmitter sites. Thus, she claims that the available transmitter site area is limited to an area comprising 264 square kilometers while the available transmitter site area for Channel 257C is 992 square kilometers. She also points out that in light of the two expressions of interest which were filed for Channel 272C at Indian Springs, the Commission may be assured that the "white area" will be served by a station without forcing petitioner to move her station to a channel and location of no interest to her. Petitioner further states that it is well established Commission policy to allot channels with the least site restriction possible in order to provide greater flexibility in selecting transmitter sites, citing Vacaville, CA, 4 FCC Rcd 8315 (1989), recon. den., 6 FCC Rcd 143 (1991). Here, the allotment of Channel 257C at Indian Springs requires a site restriction of 21.2 kilometers southwest while the allotment of Channel 272C and 276C require a site restriction of 30 kilometers west. Thus, she states that the site restriction required to accommodate either of these channels would reduce the total practical permissible site area by 73% from that available for Channel 257C.

11. Assuming that it is proper to compare KHWY's proposal with that of petitioner's, she states that her proposal should still be granted. Petitioner provides an engineering study disputing the population gain showing made by KHWY. She states that the assumed facilities for Class C allotments is 100 kW at 300 meters HAAT but that KHWY used maximum facilities of 600 meters HAAT.⁷ She states that the assumed transmitter sites proposed by both her and KHWY are above 300 meters HAAT. Therefore, her engineer has assumed an antenna centerline height of 30 meters above ground for purposes of coverage calculations. Based on these facilities, petitioner states that a Class C station operating from the site proposed by KHWY would provide service to only 10,393 people while her proposal would provide service to 635,134 people, for a different of 624,741 persons. Further, if the upgrade of Station KMXX at Imperial is factored into the equation, the total number of additional people will rise to

⁷ See Greenup, Kentucky, 4 FCC Rcd 3843 (1989).

637,747 over that proposed by KHWY. Thus, she contends that her proposal clearly will be serve the public interest.

12. In response to the counterproposal Public Notice, ISBC and the Mandels each filed comments stating their intention to apply for Channel 272C, if allotted to Indian Springs.

Discussion

13. As an initial matter, we disagree with the petitioner that it is improper to consider KHWY's proposal to allot Channel 272C at different coordinates instead of Channel 257C at Indian Springs since KHWY does not intend to apply for the channel. The issuance of the Order to Show Cause is to provide the licensee/permittee with an opportunity to show that the benefits flowing from the existing station remaining on its presently licensed channel outweigh the public interest benefits accruing from a new allotment elsewhere. Thus, the Order to Show Cause takes on the coloration of a competing proposal, that is, the allotment of Channel 258B at Mountain Pass, and Channel 260C2 at Kingman, Arizona, versus the allotment of Channel 257C in lieu of Channel 257A at Indian Springs. Therefore, the alternate proposal advanced by KHWY is properly advanced for consideration herein. Further, while the Commission will not force an existing station to relocate its transmitter site to accommodate an allotment elsewhere, petitioner proposed in her petition to have Channel 257C allotted to Indian Springs at coordinates different from that specified in the station's outstanding construction permit. Thus, since the petitioner has indicated her willingness to relocate Station KPXC should it be upgraded to a Class C, the imposition of a different transmitter site falls within the Commission's existing policy to impose a different site restriction to accommodate an allotment elsewhere. See, Rockport, Gregory, Alice and Armstrong, Texas, 4 FCC Rcd 8075 (1989) (permittee or licensee that seeks a higher class channel which requires a new transmitter site cannot invoke policy against involuntary transmitter site moves if the move is needed to accommodate its request for an upgrade and a number of other mutually exclusive requests for upgrade).

14. Based on the information before us, we believe the public interest would be served by substituting Channel 257C for Channel 257A at Indian Springs and modifying Station KPXC's license to specify the higher class channel, since it could enable Station KPXC to expand its coverage area and service a greater population, including a first fulltime aural service to over 1,500 people. We will also modify the licenses of Stations KHYZ to specify operation on Channel 259B at Mountain Pass, California, KGMN to specify operation on 261C2 at Kingman, Arizona, and KZEZ-FM to specify operation on Channel 260C at St. George, Utah. We find that the objections raised by KHWY and New West do not raise a substantial and material question of fact which would require a hearing on the proposed modification. As the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of new or expanded service at another community. See, e.g., Marietta, Ohio, and Ravenswood, West Virginia, 2 FCC Rcd 4681 (1987) and Albany, New York, et al., 2 FCC Rcd 400 (1987). Channel 257C, if allotted at the coordinates proposed by the petitioner, would result in a gain in population served by Station KPXC of 720,333 persons, with a first fulltime aural service

being provided to 1,549 persons within an 8,647 square kilometer area. The allotment of Channel 272C, as proposed by KHWY, would result in a gain in population served of 606,655 people. We recognize that at the time KHWY filed its proposal to allot Channel 272C and/or Channel 276C in lieu of Channel 257C at Indian Springs, either alternate channel would have provided a first fulltime aural service to a larger population within a greater area because it would have provided such service to the community of Beatty, Nevada, with its population of 1,623 people. However, on September 25, 1997, an application for a construction permit (BPH-970925MM) was filed by Beatty Mountain Broadcasting Company to operate on Channel 262A at Beatty, Nevada. Therefore, at this time, the allotment of either alternate channel may not provide coverage to a greater "white area" population. We believe that enabling Station KPXC to provide service to an additional 116,289 persons while still providing service to 1,549 people without any fulltime aural service outweighs any detrimental effects arising from Stations KHYZ and KGMN changing their operating channels. Further, in accordance with Commission policy, petitioner has stated her intention to reimburse KHWY and New West for the reasonable costs associated with each station's channel change, which petitioner states includes the cost of modifying the road signs alerting travelers to the station's position on the dial. We find that KHWY has not presented any reason why it cannot continue to provide the "unique" safety service to travelers along Interstate Route 15 if Station KHYZ operates on Channel 259B instead of its present Channel 258B.

15. We also find to be without merit KHWY's argument that the operation of a high powered Class C station at Indian Springs, operating only two channels removed from its Mountain Pass station, would cause harmful interference. Stations are protected from undue interference by compliance with the minimum distance separation and power and antenna height requirements as set forth in Sections 73.207 and 73.211, respectively. See, Ludlow, California, 10 FCC Rcd 563 (1995). Here, the allotment of Channel 257C at Indian Springs complies with the Commission's mileage separation requirements when the proposed channel changes at Mountain Pass, Kingman and St. George are also made. New West provided no separate showing as to why its Station KGMN should not be modified to specify Channel 261C2 at Kingman. Therefore, for the same reasons discussed above, we find that the public interest would be served by modifying Station KGMN's license to specify operation on the alternate Class C2 channel.

17. We will also allot Channel 272C to Indian Springs in light of the fact that ISBC and the Madels each filed pleadings expressing their intention to apply for the channel, if allotted. We find that the petitioner has not provided a sufficient showing that a suitable transmitter site is unavailable because of the required site restriction northwest of Indian Springs. While the theoretical transmitter site area may be reduced because of the existence of the Nevada Test Site, Nellis Air Force Range, the Ash Meadows National Wildlife Refuge and the Desert National Wildlife Range, no showing has been presented that the exclusion of these areas as possible transmitter sites will leave no usable area in which to locate a transmitter. Rather, two parties, by the fact that they filed reply comments expressing an intention to operate on Channel 272C, knowing the required transmitter site restriction, believe that a suitable transmitter site can be utilized.

Technical Summary

16. Channel 257C can be allotted to Indian Springs in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.2 kilometers (13.2 miles) southwest to accommodate petitioner's desired transmitter site. Channel 272C can be allotted to Indian Springs with a site restriction of 18.4 kilometers (11.4 miles) northwest to avoid a short-spacing to Station KFMS-FM, Channel 270C, Las Vegas, Nevada. Channel 261C2 can be allotted to Kingman, Arizona, at Station KGMN's licensed transmitter site. Channel 260C can be allotted to St. George, Utah, at Station KZEZ's licensed transmitter site. Channel 259B can be allotted to Mountain Pass, California, at Station KHYZ's licensed transmitter site.⁸ Concurrence by the Mexican government in the allotments at Kingman and Mountain Pass have been received since both communities are located within 320 kilometers (199 miles) of the U.S.-Mexican border.

17. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Claire B. Benezra for Station KPXC, Indian Springs, Nevada, IS MODIFIED to specify operation on Channel 257C, in lieu of Channel 257A, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of KHWY, Inc. for Station KHYZ, Mountain Pass, California, IS MODIFIED to specify operation on Channel 259B in lieu of Channel 258B, the license of New West Broadcasting Systems, Inc. for Station KGMN, Kingman, Arizona, IS MODIFIED to specify operation on Channel 261C2 in lieu of Channel 260C2, and the license of KZEZ, Inc. for Station KZEZ, St. George, Utah, IS MODIFIED to specify operation on Channel 260C in lieu of Channel 259C, subject to the following conditions:

⁸ The coordinates for Channel 257C at Indian Springs, NV, are 36-25-18 NL; 115-48-35 WL. The coordinates for Channel 272C at Indian Springs are 36-41-41; 115-48-37. The coordinates for Channel 261C2 at Kingman, AZ, are 35-06-37; 113-52-55. The coordinates for Channel 260C at St. George, UT, are 36-50-49; 113-29-28. The coordinates for Channel 259B at Mountain Pass, CA, are 35-29-27; 115-33-27.

(a) Nothing contained herein shall be construed as authorizing any change in Station KHYZ's license, BLH-960313KB, Station KGMN's license, BLH-901120KG, or Station KZEZ's license, BLH-941123KE, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-891120KG, BLH-960313KB and BLH-941123KE, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

19. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following licensees, as follows: KHWY, Inc., Station KHYZ, P.O. Box 25606, Los Angeles, CA 90025; New West Broadcasting Systems, Inc., Station KGMN, 812 East Beale Street, Kingman, AZ 86401; KZEZ, Inc., Station KZEZ, P.O. Box 1450, 210 N. 1000 East, St. George, UT 84771-1450.

20. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective June 1, 1998, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>
Kingman, Arizona	234C, 261C2, 290C1
Mountain Pass, California	259B
Indian Springs, Nevada	257C, 272C
St. George, Utah	228A, 240C, 260C

21. A filing window for Channel 272C at Indian Springs, Nevada, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
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